

Office of Chief Counsel
Internal Revenue Service

memorandum

CC: [REDACTED]: [REDACTED]: [REDACTED]: TL-N-5533-00
[REDACTED]

date:

to: Chief, Examination Division, [REDACTED] District
Attention: [REDACTED]
[REDACTED]

[REDACTED], Group Manager, Employment Tax
[REDACTED], Employment Tax Specialist
[REDACTED]

from: [REDACTED], Associate Area Counsel, LMSB
[REDACTED], Attorney

subject: Request for Pre-Review of Non-docketed Significant Advice

Taxpayers: (1) [REDACTED] (EIN XX)
(2) [REDACTED] (EIN [REDACTED])
(3) [REDACTED] (EIN [REDACTED])
(4) [REDACTED] (EIN [REDACTED])
(5) [REDACTED] (EIN [REDACTED])

Issue: Statute Extensions for Employment Taxes for years prior to
[REDACTED]

Statute of Limitations: [REDACTED]

THIS ADVICE CONSTITUTES RETURN INFORMATION SUBJECT TO I.R.C. § 6103.
THIS ADVICE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO ATTORNEY-
CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND IF PREPARED IN
CONTEMPLATION OF LITIGATION, SUBJECT TO THE ATTORNEY WORK PRODUCT
PRIVILEGE. ACCORDINGLY, THE EXAMINATION OR APPEALS RECIPIENT OF THIS
DOCUMENT MAY PROVIDE IT ONLY TO THOSE PERSONS WHOSE OFFICIAL TAX
ADMINISTRATION DUTIES WITH RESPECT TO THIS CASE REQUIRE SUCH
DISCLOSURE. IN NO EVENT MAY THIS DOCUMENT BE PROVIDED TO EXAMINATION,
APPEALS, OR OTHER PERSONS BEYOND THOSE SPECIFICALLY INDICATED IN THIS
STATEMENT. THIS ADVICE MAY NOT BE DISCLOSED TO TAXPAYERS OR THEIR
REPRESENTATIVES.

THIS ADVICE IS NOT BINDING ON EXAMINATION OR APPEALS AND IS NOT A
FINAL CASE DETERMINATION. SUCH ADVICE IS ADVISORY AND DOES NOT
RESOLVE SERVICE POSITION ON AN ISSUE OR PROVIDE THE BASIS FOR CLOSING
A CASE. THE DETERMINATION OF THE SERVICE IN THE CASE IS TO BE MADE
THROUGH THE EXERCISE OF THE INDEPENDENT JUDGMENT OF THE OFFICE WITH
JURISDICTION OVER THE CASE.

The purpose of this memorandum is to supplement our advice dated December 5, 2000, in light of the fact that Exam has decided to secure individual Forms SS-10, "Consent to Extend the Time to Assess Employment Taxes," from certain subsidiaries, including the following five subsidiaries:

1. [REDACTED] (EIN XX)¹
2. [REDACTED] (EIN [REDACTED])
3. [REDACTED] (EIN [REDACTED])
4. [REDACTED] (EIN [REDACTED])
5. [REDACTED] (EIN [REDACTED])

Given the imminent expiration of the statute of limitations, we have assumed in rendering this memorandum that the statute of limitations for the assessment of employment taxes with respect to the foregoing entities has been validly extended through [REDACTED]. Furthermore, our advice herein is applicable for tax years prior to (but not including) the [REDACTED] year.

ISSUES

For each of the following entities, (a) how should the entity's name be captioned on the Form SS-10, and (b) whether a transferee consent should be obtained from the corporation into which the entity was merged:

1. [REDACTED] (EIN XX)
2. [REDACTED] (EIN [REDACTED])
3. [REDACTED] (EIN [REDACTED])
4. [REDACTED] (EIN [REDACTED])
5. [REDACTED] (EIN [REDACTED])

CONCLUSIONS

a. Captions on Form SS-10

1. [REDACTED] (EIN XX)

Since there are conflicting facts as to whether [REDACTED] (which [REDACTED] was merged with and into) was merged into [REDACTED] ("[REDACTED]"), we recommend you obtain two Forms

¹ On a listing that you have provided and the Current Consent, the EIN of [REDACTED] is shown as EIN [REDACTED]. However, this may be an error, as an INOLE (a copy of which is affixed hereto as Exhibit A) shows [REDACTED] EIN as [REDACTED].

SS-10 (for relevant years prior to [REDACTED]), captioned as follows:

- i. [REDACTED] (EIN [REDACTED])
[REDACTED] (formerly known as [REDACTED])
[REDACTED]²) as successor in interest to
[REDACTED] (EIN: [REDACTED])
(formerly known as [REDACTED]), as
successor in interest to [REDACTED] (EIN:
XX); and
- ii. [REDACTED] (EIN: [REDACTED])
(formerly known as [REDACTED]), as
successor in interest to [REDACTED] (EIN:
XX).

2. [REDACTED] (EIN [REDACTED])

The Form SS-10 (for relevant periods prior to [REDACTED]) should be captioned as follows:

[REDACTED] (EIN: [REDACTED]), as
successor in interest to [REDACTED]
(EIN: [REDACTED]).

3. [REDACTED] (EIN [REDACTED])

Since there are conflicting facts as to whether [REDACTED]
[REDACTED] (which [REDACTED] (EIN
[REDACTED]) was merged with and into) was merged into [REDACTED]
[REDACTED] ("[REDACTED]"), we recommend you
obtain two Forms SS-10 (for relevant years prior to [REDACTED]),
captioned as follows:

- i. [REDACTED] (EIN [REDACTED])
[REDACTED] (formerly known as [REDACTED])
[REDACTED]³) as successor in interest to
[REDACTED] (EIN: [REDACTED])
(formerly known as [REDACTED]), as
successor in interest to [REDACTED]

² If you know that [REDACTED]
[REDACTED] was formerly known as [REDACTED]
[REDACTED], you can modify all applicable
parentheticals to read: (formerly known as [REDACTED]
[REDACTED] and [REDACTED]
[REDACTED]).

³ See supra note 2.

(EIN); and

ii. (EIN:), as
(formerly known as), as
successor in interest to
(EIN)

4. (EIN)

The Form SS-10 (for relevant periods prior to) should
be captioned as follows:

(EIN:), as
successor in interest to
(EIN)

5. (EIN)

Since there are conflicting facts as to whether
(which (EIN
) was merged with and into) was merged into
(" "), we recommend you
obtain two Forms SS-10 (for relevant years prior to),
captioned as follows:

i. (EIN
) (formerly known as
) as successor in interest to
(EIN:), as
(formerly known as), as
successor in interest to
(EIN:); and

ii. (EIN:)
(formerly known as),
as successor in interest to
(EIN:)

b. Transferee Consents

Transferee consents need not be obtained because under the
laws of the states governing each merger and subsequent mergers
of the surviving corporations, the transferees would be liable
for the transferor's liabilities.

⁴See supra note 2.

FACTS

1. [REDACTED] (EIN [REDACTED])

Prior to [REDACTED], [REDACTED], a Delaware corporation (hereinafter sometimes referred to as "old-[REDACTED]") was the sole shareholder of [REDACTED], a California corporation. (hereinafter sometimes referred to as "[REDACTED]"). See first paragraph under the heading "Recitals" in the "Plan of Merger" (attached hereto as Exhibit B).

As of [REDACTED], [REDACTED] was merged with and into old-[REDACTED], and the separate existence of [REDACTED] ceased and old-[REDACTED] survived. See numbered [REDACTED] of the Plan of Merger.

Paragraph number [REDACTED] of the Plan of Merger stated, in pertinent part, "[t]he Surviving Corporation shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, all in the manner and with the effect set forth in Section 1107 of the California General Corporation Law."

As stated in our prior memorandum, dated December 5, 2000, [REDACTED] ("old-[REDACTED]"; EIN [REDACTED]), a Delaware corporation, formed three corporations in [REDACTED], including [REDACTED] (EIN [REDACTED]). On [REDACTED], a reorganization took place such that old-[REDACTED] became a wholly-owned subsidiary of [REDACTED].

In [REDACTED], [REDACTED] changed its name to [REDACTED] ("new-[REDACTED]"; same EIN as [REDACTED]) and old-[REDACTED] changed its name to [REDACTED].

On [REDACTED], [REDACTED] changed its name to [REDACTED] ("[REDACTED]").

The merger document (that was attached as Exhibit G to our December 5, 2000 memorandum) provided that effective [REDACTED], [REDACTED] was to merge "with and into" [REDACTED]⁵, an Indiana corporation, with [REDACTED] as the surviving corporation; the separate corporate existence of [REDACTED] was to cease upon the merger. See numbered [REDACTED] of the Plan of Merger.

⁵ [REDACTED] became a wholly-owned first tier holding company of new-[REDACTED].

Paragraph numbered [REDACTED] of the Plan of Merger stated in part, "[REDACTED] shall assume and be responsible and liable for all liabilities and obligations of [REDACTED] as required by Indiana law."

Article [REDACTED] of the Plan of Merger states that it was to be governed by the laws of the State of Indiana.

As indicated in our memorandum dated December ___, 2000, we are unable to determine from the various IDRS transcripts, dated [REDACTED], whether [REDACTED] did, in fact, merge out of existence, since: (1) an INOLEX transcript for [REDACTED]'s EIN shows a cross-reference to EIN [REDACTED], which belongs to new-[REDACTED]; (2) conversely, an INOLEX transcript for new-[REDACTED] cross-references [REDACTED] EIN with a code "SB," which we presume means "subsidiary;" and (3) further, a LEXIS record shows the corporate status of [REDACTED] as "surrendered," not "merged out," and in fact, the LEXIS record for [REDACTED] does not mention a merger. Thus, it is unclear whether [REDACTED] was merged out of existence as provided for in the merger documents.

2. [REDACTED]

Effective [REDACTED], [REDACTED], an Oklahoma corporation, the sole stockholder of [REDACTED], an Oklahoma corporation (hereinafter sometimes referred to as "[REDACTED]"), merged [REDACTED] into itself pursuant to Title 18, Section 1083 of the Oklahoma Statutes and assumed any and all of [REDACTED]'s liabilities and obligations. Affixed hereto as Exhibit C are copies of the following documents related to the merger: an "Action Taken by the Board of Directors of [REDACTED]. Held by Unanimous Written Consent" (Consent) consenting to such merger and a "Certificate of Merger."

Copies of an ENMOD and a LEXIS printout affixed hereto as Exhibits D and E, respectively do not reflect any changes to the name of [REDACTED] (EIN: [REDACTED]). In addition, a representative of new-[REDACTED] has indicated that [REDACTED] has not undergone any reorganizations, dissolutions, etc.

3. [REDACTED] (EIN: [REDACTED])⁶

Effective [REDACTED], in accordance with 8 Del. Code § 253, [REDACTED] (EIN: [REDACTED]) was merged into its parent, [REDACTED], which owned [REDACTED]% of its stock. Affixed hereto as Exhibit G are copies of the following documents related to the merger: a "Certificate of Ownership and Merger" and an "Agreement of Merger."

Paragraph [REDACTED] of the "Agreement of Merger" states "[t]he Surviving Corporation shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, all in the manner and with the effect set forth in Section 259 of the General Corporation Law of the State of Delaware."

4. [REDACTED] (EIN [REDACTED])

Affixed hereto as Exhibit H is a copy of Certified Articles of Merger for [REDACTED] and [REDACTED] ([REDACTED]). Effective [REDACTED], [REDACTED] merged with and into its sole shareholder, [REDACTED]. Paragraph [REDACTED] of the "Agreement of Merger," which is affixed as an exhibit to the Articles of Merger, states, in pertinent part, "[t]he Surviving Corporation shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, all in the manner and with the effect set forth in Article 5.06(A)(2) of the Business Corporation Act of the State of Texas."

Copies of an ENMOD and LEXIS printout affixed hereto as Exhibits I and J, respectively do not reflect any changes to the name of [REDACTED] (EIN: [REDACTED]), and a representative of new-[REDACTED] has indicated that [REDACTED] has not undergone any reorganizations, dissolutions, etc.

5. [REDACTED] (EIN [REDACTED])

Affixed hereto as Exhibit K is a copy of Certificate of Ownership, merging "[REDACTED]," a Delaware corporation into "[REDACTED]."

⁶ This corporation is shown on listings you have provided us and the rider affixed to the Current Consent as "[REDACTED]." However, according to the INOLES and LEXIS printouts affixed hereto as Exhibit F and the merger documents referred to below, the entity's name was "[REDACTED]."

Effective [REDACTED], [REDACTED] merged with and into its sole shareholder, [REDACTED]. Paragraph [REDACTED] of the Agreement of Merger, which is affixed as an Exhibit to the Certificate of Ownership, states, in pertinent part, "[t]he Surviving Corporation shall be responsible and liable for all liabilities and obligations of each of the Constituent Corporations, all in the manner and with the effect set forth in Section 259 of the General Corporation Law of the State of Delaware."

DISCUSSION

I. Generally

As we noted in our prior memorandum, dated December 5, 2000, when state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891, 892 (3d Cir. 1929).

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931). When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972).

With respect to transferee liability, as we noted in our prior memorandum, dated December 8, 2000, the Service will attempt to assert that a successor is a transferee, as a last resort, when the statute of limitations under I.R.C. § 6501 has expired but the statute of limitations under I.R.C. § 6901 is still open. See GCM 34,970, at page 18, and CCDM 35.10.6.1 ("should the issuance of a new statutory notice be barred by the statute of limitations, it is advisable that the case be processed and handled as a transferee case").

Section 6901 does not create or define the existence of a transferee's liability, but affords the Commissioner a procedural remedy for collection of tax. Adams v. Commissioner, 70 T.C. 373 (1978), aff'd in part without published opinion and dismissed in part, 688 F.2d 815 (2d Cir. 1982); and Gumm v. Commissioner, 93 T.C. 475, 479 (1989). Under I.R.C. § 6901(a)(2), assertion of transferee liability for employment taxes is allowed if the

transferee liability arose on the liquidation of a partnership or corporation, or on a reorganization within the meaning of I.R.C. § 368(a).

II. Application of the Law

1. [REDACTED] (EIN XX)

1. Forms SS-10

The Plan of Merger, by which [REDACTED] was merged into [REDACTED] (formerly known as [REDACTED]) (EIN: [REDACTED]), provided that the agreement was to be governed by the laws of the State of California, and that the surviving corporation would be responsible and liable for all liabilities and obligations of the constituent corporations.

California law provides:

Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them.

CAL. CORP. CODE § 1107(a) (Deering 2000).

Here, according to California law and the terms of the merger agreement, old-[REDACTED] became primarily liable, as a successor in interest, for the employment taxes of [REDACTED].

The merger agreement, by which [REDACTED] was purportedly merged into [REDACTED], provides that the merger is to be governed by the laws of the State of Indiana, and that the surviving corporation (i.e., [REDACTED]) would assume or succeed to the liabilities of the merged corporations.

According to Indiana law⁷ and the terms of the merger agreement pursuant to which old-[REDACTED] was purportedly merged into [REDACTED], [REDACTED] would be primarily liable, as a successor in interest,

⁷ IND. CODE ANN. § 2-1-40-6(a)(3) (Burns 2000) provides that "[w]hen a merger takes effect . . . [t]he surviving corporation has all liabilities of each corporation party to the merger"

for the liabilities of old-[REDACTED].

Since there are conflicting facts as to whether old-[REDACTED] was merged into [REDACTED], we recommend you obtain two Forms SS-10 (for relevant years prior to [REDACTED]), captioned as set forth under the heading CONCLUSIONS.

Since both California law and Indiana law impose primary liability on a surviving corporation in a merger for the debts of the merged entity, you need not procure a transferee consent form with respect to [REDACTED]'s liabilities.

2. [REDACTED] (EIN [REDACTED])

1. Form SS-10

The Consent, by which the Board of Directors of [REDACTED] resolved that [REDACTED] be merged into [REDACTED], does not have a "choice of law" provision specifying the state law to be used in governing or construing it. However, in the Consent, [REDACTED]'s Board of Directors resolved that [REDACTED] be merged with and into [REDACTED] pursuant to Title 18, Section 1083 of the Oklahoma Statutes and that [REDACTED], as the surviving entity, assume any and all of [REDACTED]'s liabilities and obligations. Given the merger was effected pursuant to a provision of the Oklahoma statutes and the merger involved Oklahoma corporations, Oklahoma law should be applied.

Title 18, Section 1088 of the Oklahoma Statutes provides, in pertinent part, as follows:

When any merger or consolidation shall have become effective pursuant to the provisions of the Oklahoma General Corporation Act . . . rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations, from that time forward, shall attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

Here, according to Oklahoma law and the Board's resolution, [REDACTED] is primarily liable, as a successor in interest, for the employment taxes of [REDACTED]. Consequently, you should secure a Form SS-10 from [REDACTED]

with respect to the employment tax liabilities of [REDACTED].

2. Form 4016

We do not know if there is an Agreement of Merger with respect to [REDACTED]'s merger into [REDACTED]. New-[REDACTED] has only provided the Consent of [REDACTED]'s Board with respect to this merger, in which it is stated that the Board directs [REDACTED], as the surviving corporation in the merger, to assume any and all of [REDACTED]'s liabilities. Thus, in this situation, we have no evidence that [REDACTED] is a transferee at law with respect to [REDACTED]'s employment tax liabilities by virtue of contractual liability.

In any event, since [REDACTED] is liable as a successor in interest under Oklahoma state law for [REDACTED]'s employment tax liabilities, a transferee form is not required. Thus, we do not recommend that you secure a Form 4016 from [REDACTED] for the employment tax liabilities of [REDACTED].

3. [REDACTED] (EIN [REDACTED])

The merger agreement by which [REDACTED] was merged into old-[REDACTED] provides that the agreement was to be governed by the laws of the State of Delaware and that old-[REDACTED] will be liable for the all liabilities and obligations of each constituent corporation pursuant to section 259 of the General Corporation Law of the State of Delaware.

8 Del. Code § 259 provides, in pertinent part, that when any merger shall have become effective:

[A]ll rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

According to Delaware law and the terms of the merger agreement pursuant to which [REDACTED] was purportedly merged into old-[REDACTED], old-[REDACTED] became primarily liable, as a successor in interest, for the liabilities of [REDACTED].

Since there are conflicting facts as to whether old-[REDACTED] was merged into [REDACTED], we recommend you obtain two Forms SS-10 (for relevant years prior to [REDACTED]), captioned as set forth under the heading CONCLUSIONS.

Since both Delaware law and Indiana law impose primary liability on a surviving corporation in a merger for the debts of the merged entity, you need not procure a transferee consent form with respect to [REDACTED]'s liabilities.

4. [REDACTED] (EIN [REDACTED])

The merger agreement by which [REDACTED] was merged into [REDACTED] provides that the merger was to be governed by the laws of the State of Texas and that the surviving entity would be responsible and liable for all liabilities and obligations of each constituent corporation, all in the manner and with the effect set forth in Article 5.06(A)(2) of the Business Corporation Act of the State of Texas.

Article 5.06(a) of the Business Corporation Act of the State of Texas states, in pertinent part, when a merger takes effect:

(2) all rights, title and interests to all real estate and other property owned by each domestic or foreign corporation and by each other entity that is a party to the merger shall be allocated to and vested in one or more of the surviving or new domestic or foreign corporations and other entities as provided in the plan of merger without reversion or impairment, without further act or deed, and without any transfer or assignment having occurred, but subject to any existing liens or other encumbrances thereon;

(3) all liabilities and obligations of each domestic or foreign corporation and other entity that is a party to the merger shall be allocated to one or more of the surviving or new domestic or foreign corporations and other entities in the manner set forth in the plan of merger, and each surviving or new domestic or foreign corporation, and each surviving or new other entity to which a liability or obligation shall have been allocated pursuant to the plan of merger, shall be the primary obligor therefor and, except as otherwise set forth in the plan of merger or as otherwise provided by law or contract, no other party to the merger, other than a surviving domestic or foreign corporation or other entity liable thereon at the time of the merger and no other new domestic or foreign corporation or

other entity created thereby, shall be liable therefor;

Based on the above, [REDACTED] is primarily liable as a successor in interest for the employment taxes of [REDACTED]. Consequently, you should secure a Form SS-10 from [REDACTED] as the successor in interest, for the employment tax liabilities of [REDACTED].

Since [REDACTED] is liable as a successor in interest under Texas state law for [REDACTED]'s employment tax liabilities, a transferee form is not required. Thus, we do not recommend that you secure a Form 4016 from [REDACTED] for the employment tax liabilities of [REDACTED].

5. [REDACTED] (EIN [REDACTED])

The merger agreement, by which [REDACTED] was merged into old-[REDACTED] provides that the agreement was to be governed by the laws of the State of Delaware, and that the surviving corporation would be responsible and liable for all liabilities and obligations of the constituent corporations.

Thus, according to the terms of the merger agreement and Delaware law (which is quoted above in connection with the discussion concerning [REDACTED]), old-[REDACTED] became primarily liable as successor in interest for the liabilities of [REDACTED].

Since there are conflicting facts as to whether old-[REDACTED] was merged into [REDACTED], we recommend you obtain two Forms SS-10 (for relevant years prior to [REDACTED]), captioned as set forth under the heading CONCLUSIONS.

This advice has been coordinated with the Office of Chief Counsel.

If you have any questions, please contact [REDACTED] at [REDACTED] or [REDACTED] at [REDACTED].

Attachments: As stated